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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 156

CLAYTON S. KRAMER,

Petitioner,

—v.—

CARIBBEAN MILLS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether Section 1359 of the Judicial Code precludes the creation of diversity of citizenship jurisdiction through an assignment of a disputed claim which, for the sake of argument, may be assumed to vest technical legal title to the claim in the assignee under state law, but which is accompanied by a collateral agreement under which the assignee agrees to pay 95 percent of the net recovery on the claim to the assignor, and where the assignment was admittedly made with the motive of gaining access to the Federal court by creating diversity jurisdiction.

STATEMENT

A dispute over a contract arose between Panama and Venezuela Finance Company ("Panama"), a Panamanian corporation, and the respondent, Caribbean Mills, Inc. ("Caribbean"), a Haitian corporation.[1] The controversy related to whether Caribbean was required to make certain annual installment payments, commencing on June 1, 1962, on the contract. (App. 3-5, 7-8) Caribbean's position was that certain events occurring concurrently with and subsequent to the execution of the contract in 1959 had extinguished any obligations which it had to make the annual payments. Panama made prompt demand for payment of the annual installment allegedly due it on June 1, 1962, and Caribbean refused to pay. Subsequent annual installment payments have likewise not been paid.

By September, 1964, three of the annual payments allegedly due from Caribbean to Panama had not been paid. In that month, after certain negotiations conducted by one Jack Banner, a Wichita Falls, Texas, attorney at law, Panama executed and delivered to one Clayton S. Kramer, another Wichita Falls attorney, an assignment (the "Assignment") in the form set forth at pages 7-9 of petitioner's brief and pages 13-14 of the Appendix. Kramer had had absolutely no prior acquaintance with any of the parties to, or the subject matter of, the contract. (App. 31-32) In the Assignment, it was recited that "for and in con-

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[1] Originally a third person, one Kelly, a citizen of the United States, was also a party to the contract. Caribbean took the position that certain actions of Kelly and Panama extinguished Caribbean's liabilities under the contract. (App. 8-9) On the other hand, since Kelly and Panama were originally joint obligees of Caribbean under the contract, Panama's position depends on an assignment which it asserted Kelly made to it. (App. 4, 77)

Caribbean is a manufacturer of flour and flour by-products, operating a mill at Port-au-Prince, in Haiti. (App. 70; R. 99)

sideration of One Dollar ($1.00) and other good and valuable consideration"[2] Panama assigned to Kramer all of its "right, title and interest, including all actions, causes of actions, claims, right to make demands, right to designate place of performance and payment, monies due and/or to become due, arising from or out of" the contract in dispute. (App. 13)

Simultaneously, however, Kramer and Panama executed a secret side agreement (the "Side Agreement"). The Side Agreement is set forth at pages 9-11 of the petitioner's brief and at pages 15-16 of the Appendix. In the Side Agreement, it was agreed that Kramer would pay back to Panama 95 percent of the net recovery, after deduction of attorneys' fees and costs, obtained from Caribbean under the contract which had been assigned. Of the net recovery, Kramer was only to "retain five (5) per cent for his own use and benefit."[3]

The Side Agreement also recited an agreement on Kramer's part to make demand under the contract and to make collection or prosecution of all claims thereon. It also restricted the attorneys' fees and expenses which Kramer could incur in the prosecution of the claims. A contingent fee was contemplated under the Side Agree-

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[2] The record is to the effect that while the dollar was paid, no other consideration passed except to the extent that the undertakings of Kramer set forth in the side agreement with respect to the claim could be said to be consideration. (App. 47)

[3] There is no explanation in the record of why it was that the entire agreement between the parties, embraced in the Assignment and the Side Agreement, was not united in a single instrument. It is the unfortunate fact that one reason why people sometimes express a single, integrated agreement in two written instruments is so that part of the overall arrangement may be produced without the remainder. As will be seen at pages 5-7, *infra*, this was done here.

ment. Kramer agreed in the Side Agreement that Panama would not have to bear the expenses of suit. However, as previously indicated, this did not preclude deduction of a contingent fee and expenses from the proceeds of a successful suit, and such a deduction was expressly contemplated. (App. 15-16)

Kramer had first heard of the contract between Panama and Caribbean in 1964 when he had a talk with another attorney in Wichita Falls, Jack Banner, who was then briefing a legal point, obviously for Panama, concerning the enforcement of the alleged unpaid obligations under the contract. Banner mentioned to Kramer that "there might be a claim that could be acquired" by Kramer.[4] (App. 34-

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[4] Kramer was hardly what one could describe as a spontaneous witness with respect to these episodes. Some idea of this may be gathered from the following passages from his testimony with respect to this aspect of the matter:

"Q. Now, state the circumstances of your being advised of the existence of this contract.

"A. As well as I can recall it was in the early part of the summer of 1964, and I was talking to Mr. Banner, as we frequently did and still do, and he brought the subject up. Now, he didn't bring up the subject of this specific contract, he brought up the subject of the claim and the fact that there might be a claim that could be acquired.

"Q. Did he tell you that he was doing some briefing in connection with the claim?

"A. I think—in connection with the claim—no, sir. I don't believe he did.

"Q. Did he tell you he was doing some briefing in connection with this contract?

"A. I could see he was doing some briefing.

* * * * *

"Q. Did he tell you that Mr. Cohn had asked him to do some briefing in connection with this matter?

"A. No, sir, he did not.

"Q. Did you later find out that that was the case?

"A. No, sir.

"Q. Did he tell you subsequently that he was briefing a legal point in connection with this matter at the request of Mr. Roy Cohn?

"A. No, sir.

(*continued on following page*)

35) At this point, three annual installments allegedly due under the contract were unpaid. After Kramer said "yes" to becoming assignee of the contract, Banner proceeded to work out the assignment. (App. 37-38) Somewhere in the process, Banner, who had been previously acting for Panama, became Kramer's attorney in connection with the assignment and the collection of the claim against Caribbean, and has remained so throughout these proceedings, including the proceedings in this Court. (App. 46) A retainer agreement was entered into, two weeks after the Assignment, between Kramer and Banner's law firm; it provided for the maximum attorneys' fee permitted under the secret Side Agreement negotiated between Banner and Panama. Banner's firm reserved the exclusive right to determine whether an appeal should be taken from an unfavorable judgment. As contemplated by the Side Agreement, the retainer was on a contingent-fee basis. (App. 18-19)

Notwithstanding that the Assignment under Texas law (presumably despite the Side Agreement) would have per-

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"Q. Or of the law firm that Mr. Cohn is connected with?
"A. No, sir.
"Q. Did he tell you that it might be possible for someone to acquire this claim and make some money on it?
"A. Yes, sir.

• • • • •

"Q. But he did tell you he was briefing a legal point involving a cause of action for a claim on which if prosecuted or enforced might result in profit for anybody that prosecuted it, isn't that right?
"A. That may be right. I am not saying that it isn't. He told me that he was briefing—at that time on this point—I'm not sure what he was doing. He told me he was doing some briefing, and as I recall he mentioned at some time or other that he was doing some briefing.
"Q. Did you later learn that this claim Mr. Banner was talking about was a claim under this contract between Panama-Venezuela Finance Company, Roy Kelly, and Caribbean Mills, Inc.?
"A. I think that's right." (App. 34-36)

mitted Kramer (under his theory of the case[5]) to institute an action against Caribbean in a Texas state court, Banner proceeded to file suit in Kramer's name in the United States District Court for the Northern District of Texas, Wichita Falls Division. This was done only six weeks after the date of the Assignment. (App. 1) The complaint pleaded the assignment of Panama's claim to Kramer but made no reference whatsoever to the secret Side Agreement. (App. 2-5) Jurisdiction was predicated solely on alleged diversity of citizenship, the assignee, Kramer, being a citizen of Texas and Caribbean an alien corporation.[6] (App. 2, 3) It is common ground between the parties in

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[5] It was the respondent's position that the assignment of the claim by Panama to Kramer was ineffective because the rights, if any, which Panama sought to assign were, in turn, dependent on an assignment to it from Kelly (see n. 1, p. 2, *supra*), and Kelly had never validly made such an assignment to Panama. See Brief for Appellant (the present Respondent), Court of Appeals, pp. 12-13, 18-26. We will henceforth, however, discuss the jurisdictional issue in the case on the hypothesis that the assignment from Panama to Kramer was valid under state law, although, for the reasons stated—having to do with Panama's own title—this is disputed. Because of its conclusion on the jurisdictional issues, the Court of Appeals did not reach the other grounds for reversal of the District Court's judgment, including the one just referred to, which were urged by the respondent before it, and should this Court not agree with us with respect to the issues tendered to it, these other issues would remain to be resolved on remand to the Court of Appeals.

[6] Section 1332(a) of the Judicial Code in pertinent part reads as follows: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

"(1) citizens of different States;

"(2) citizens of a State, and foreign states or citizens or subjects thereof; and

"(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties."

Jurisdiction was therefore predicated upon Clause (2) of the statute, which is sometimes referred to as the "alienage" provision.

this Court that there would be no diversity of citizenship jurisdiction between two aliens—even of different nationality—such as Panama and Caribbean.[7]— The respondent promptly raised the defense of lack of jurisdiction over the subject matter. (App. 6, 10)

Prior to trial, Kramer's deposition was taken with respect to the manner in which he came to be the plaintiff in the action. On Banner's advice, Kramer refused to answer questions with respect to the existence of agreements between him and Panama apart from the face of the Assignment. (App. 20-22) After an order of court was obtained requiring an answer, the existence of the secret Side Agreement first became known to the court and Caribbean.

The District Court denied respondent's timely motion to dismiss the action for lack of jurisdiction. The motion was made on the basis that in fact the suit was between two alien corporations and the assignment to Kramer was "collusive and improper", falling squarely within the bar of Section 1359 of the Judicial Code. The only basis assigned by the court for the denial was that the Assignment was "good on its face." (App. 12)

The case then proceeded to trial at which a jury rendered a special verdict in answer to various interrogatories put to it.[8] On the basis of the jury answers to the special

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[7] It has long been settled that the Constitution's grant of jurisdiction to the Federal courts in controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects," Art. III, § 2, does not extend to suits between aliens. *Hodgson* v. *Bowerbank*, 5 Cranch 303 (U.S. 1809); *Kavourgias* v. *Nicholaou Co.*, 148 F.2d 96 (9th Cir. 1945).

[8] These interrogatories all related to the merits of the action. (App. 77-81) The trial court did not undertake to submit jurisdictional questions for determination by the jury, and such matters were expressly withheld from the jury's deliberations. (App. 33) One of the responses to the interrogatories, which, of course, was

issues the District Court entered judgment for Kramer on his assigned claims against Caribbean for $165,000. (App. 77-81)

The Court of Appeals for the Fifth Circuit, in a unanimous opinion by Judge Thornberry, reversed the judgment of the District Court, on the ground that the District Court was without subject matter jurisdiction by reason of Section 1359 of the Judicial Code. The Court of Appeals concluded that:

> "By assigning its interest under the contract and obtaining a reassignment of 95% of that interest on the same day, Panama obviously intended to designate Kramer as a collection agent with the capacity to sue in federal court. To construe these transactions in another way would require serious departure from any traditional notion of reality. The question presented, then, is whether under Section 1359 an assignee for collection purposes can properly invoke federal jurisdiction. *In our view, he cannot do so because the assignment to him was made for the purpose of creating federal jurisdiction without divesting the assignor of his interest in the lawsuit.*" (App. 85) (emphasis supplied)

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necessary in order to establish that the claim was Kramer's, obviously an element of his substantive case, was to issue (2), answered to the effect that Panama assigned its interest in the contract in question to Kramer. (App. 78) Petitioner seizes on this as somehow probative of the issues as to jurisdiction. (Brief, pp. 40, 51-52) But obviously the finding relates only to Kramer's legal title to the claim, an element of his substantive case which he would have had to have proved even in state court. See *Smith v. Kernochen*, 7 How. 198 (U.S. 1849) ("The question . . . is one of proper parties to give jurisdiction to the Federal courts; not of title in the plaintiff. That would be a question on the merits . . ." 7 How., at 216).

The Court of Appeals noted that:

> "On oral argument before this Court, counsel for appellee [Kramer] made no particular effort to deny that Mr. Kramer is simply an assignee for the purposes of collecting Panama's claim in federal court."[9] (App. 84)

This Court granted certiorari.[10]

SUMMARY OF ARGUMENT

I. 1. The device used to create Federal jurisdiction in this case is in no way distinguishable from devices which have been condemned over the years as falling within the bar of predecessor statutes equivalent in all material respects to Section 1359. These cases, decided in the years following the passage of Section 5 of the Act of March 3, 1875, and which rely on statutory language with respect to "improperly or collusively" adding parties, have condemned transfers which have not divested the assignor of his entire interest in the subject matter of the claim, where the transfer is made with a motive of creating Federal jurisdiction.

2. To be sure, there is also a line of cases which holds that where a transfer is absolute and does not leave the assignor with any interest in the subject matter of the

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[9] Indeed, in this Court, the petitioner has conceded that the question presented is whether the Assignment (presumably when taken as a whole with the Side Agreement) falls within the bar of Section 1359 where "the motive for the assignment is to gain access to the federal court by creating diversity of citizenship." Petition for Certiorari, p. 2.

[10] For the termination of the asserted conflict of circuits on the basis of which certiorari was sought, see note 13, p. 42, *infra*.

claim, the motive for making the transfer is irrelevant. The point is that the assignment here is not on that side of the line. Here the assignor retained 95 percent of the beneficial ownership in the claim and Kramer simply had technical legal title plus a 5 percent commission or percentage interest; moreover, control over the litigation remained vested in the attorney who had originally represented Panama and had arranged the assignment.

3. If a device such as that employed here were sanctioned, there is no reason why it could not and would not be used in every case where a claim capable of transfer under state law was involved and where it was desired to create Federal jurisdiction. —Petitioner points to no policy reason why such a result should be sanctioned, and all considerations of policy militate against it.

II. In order to avoid the effect of the long line of cases in this Court that hold that an assignment made for the purpose of creating Federal jurisdiction is within the statutory bar if it does not divest the assignor of his entire interest in the claim, petitioner urges three grounds.

1. It is first claimed that the 1948 codification of the Judicial Code inadvertently altered the rule established by the cases which preceded it. This is clearly not the case. While the codification repealed the "Assignee Clause" of Section 11 of the 1789 Judiciary Act, the line of authorities in question was not decided under that statute. Those cases were decided under Section 5 of the 1875 statute. While certain editorial changes were made in the text of that provision when it was carried forward into Section 1359 of the present Code, the reviser's note makes it plain that no change in substance was intended. Moreover, the operative language on the basis of which the line of cases them-

selves proceeded was retained and carried forward in the 1948 revision, with the purpose and result of not making any substantive change in the law.

2. Nor is it dispositive, as petitioner stresses, that the arrangements here might have been enforceable between the parties to them under state law and might have permitted Kramer to sue in his own name in a state court. To some extent, this argument is afflicted with the vice of the petitioner's other argument that the 1948 revision had the effect of changing the law developed under Section 5 of the 1875 statute. Moreover, such state law considerations have never been treated as controlling, and there is no reason why they should be; a Federal statute designed to establish a matter of jurisdictional policy for the Federal courts should not be subject to frustration by results which might be reached under state law based upon entirely different policy considerations.

3. Petitioner urges that the language of Section 1359 be construed more favorably toward devices to manufacture Federal jurisdiction where the underlying controversy is between aliens, as here, than in the perhaps more usual case where it is between citizens of the same state. —There is no basis whatsoever in the statutory text, or in any valid reason of policy, why this should be so.

ARGUMENT

I. THE DEVICE EMPLOYED TO CREATE FEDERAL JURISDICTION IN THIS CASE IS INDISTINGUISHABLE FROM DEVICES WHICH HAVE BEEN CONDEMNED OVER THE YEARS AS FALLING WITHIN THE BAR OF PREDECESSOR STATUTES EQUIVALENT IN ALL MATERIAL RESPECTS TO SECTION 1359 OF THE JUDICIAL CODE

The essential issue in this case is whether Section 1359 bars the use of the device of an assignment, admittedly formulated with the motive of creating Federal jurisdiction, which (a) is entered into after a controversy arises, and (b) vests legal title to a claim in the assignee but leaves the assignor with the principal beneficial interest in the recovery to be had under the claim; in effect giving the assignee only a small percentage or collector's commission interest in the claim.

There is no issue before this Court that under the laws of Texas—and indeed under the law in most states, Texas hardly being unique in this respect—an assignment in the form of the Assignment here would be enforceable as between the parties to it and that an assignee like Kramer could have brought suit on the claim in his own name in a state court.[1] Indeed, putting to one side the substantive questions, it is not questioned that an assignee like Kramer could have sued on the claim in a Federal court if he and his assignor were each parties who could have maintained an action against the defendant in that court. Similarly, although petitioners do not stress it, there is no controversy but that the Side Agreement is also enforceable under state law and operates effectively to do what it purports to do—that is, to vest a 95 per-

[1] For the substantive questions touching the assignment which are reserved, see note 5, p. 6, *supra*.

cent beneficial interest in the claim in Panama. Nor, we might add, should there be any serious controversy as to the net effect of the overall arrangement: when the two pieces of paper are read together—despite what was obviously the original desire of petitioner that they not be read together—their net effect is to vest, for the purposes of creating Federal jurisdiction, the legal title to, but only a minor beneficial interest in, a disputed claim in Kramer, and to leave 95 percent of the beneficial ownership of that claim in Panama.

1. Schemes and devices like the one unearthed in the case at bar are hardly novel. Litigants have tried for years to use them to bring cases into Federal court which otherwise could not be brought there. The elements of these schemes are in a real sense classic; they are generally very similar to one another and underscore the admonition of Ecclesiastes that there is nothing new under the sun.[2] They characteristically involve the vesting of an assignee with legal title to a disputed claim while the assignor retains either the total or the principal beneficial interest in it. Often, as here, the reservation or grant-back of the beneficial ownership of the claim is set forth in a collateral agreement which the parties to some extent may hope will stay secret.

Schemes of this sort have been uniformly condemned by the decisions of this Court under statutory language identical in all relevant respects to Section 1359 of the Judicial Code. That language was introduced into the statutes in 1875 and commanded the dismissal or remand of an original or removed action when parties had been "improperly or collusively made or joined, either as plaintiffs or de-

[2] Chapter I, verse 9.

fendants, for the purpose of creating a case cognizable or removable" in or to the Federal courts.[3]

It is instructive to review the cases as an illustration of the consistency of the decisions of this Court in striking down schemes similar to the one here.

In *Williams* v. *Nottawa*, 104 U.S. 209 (1881), Kline and Connor, residents of Michigan, transferred defaulted bonds of a Michigan municipality to Williams, who was a citizen of another state. While the transfer was apparently absolute in form, when Williams was examined at trial he admitted that the beneficial ownership had been retained by the transferors. The Court found this a "collusive transfer" within the meaning of the language of the 1875 statute and ordered the suit dismissed. 104 U.S., at 211.[4]

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[3] The statute in question was Section 5 of the Act of March 3, 1875, c. 137, 18 Stat. 472, which read as follows:

> "That if, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just. . . ."

With minor changes, not here material, the provision appeared as Section 37 of the Judicial Code of 1911 and as Section 80 of the original Title 28 of the United States Code.

[4] There was, of course, no "collusion" in *Williams* in the narrow sense in which petitioner (Brief, pp. 47-48) suggests that this statutory phrase be read: namely, collusion between the plaintiff and the defendant. There was no suggestion in the record that the municipality was a party to the scheme, and indeed it vigorously contested the jurisdiction of the federal courts. This, in fact, was so in all the cases we will discuss at pp. 14-18.

In *Farmington* v. *Pillsbury*, 114 U.S. 138 (1885), another scheme bearing a striking similarity to the present one was involved. Here the assignors cut certain coupons from a bearer bond and delivered them to the assignee; the rule with respect to such instruments being, of course, that title to the bond or its coupons passes by delivery. The assignee, like Kramer here, paid a nominal consideration to the assignor; a note for less than 10 percent of the amount of the coupons.[5] A written collateral agreement, reminiscent of the Side Agreement here, was also entered into at the same time and is quoted at 114 U.S., at 140. It was agreed that Pillsbury, the assignee, would remit 50 percent of the net collection on the coupons to Dyer, the assignor.

The Court discussed the 1875 statute in detail. It pointed out that the inclusion of the language with respect to the discovery of a jurisdictional fault "at any time after such suit has been brought or removed thereto [*i.e.*, to the Federal court]" was meant to change the old procedural rule that the objection of lack of diversity of citizenship had to be raised by motion before answer and was waived by filing an answer. See 114 U.S., at 142-43.

The Court indicated that the substantive test applicable to the case before it was whether the assignment "actually conveys *all the interest* of the assignor in the thing assigned." 114 U.S., at 144 (emphasis supplied). Otherwise,

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[5] One might observe that the assignee in *Farmington* was more generous than Kramer was here. At least the assignee in *Farmington* gave a note for $500 for $7,922 worth of coupons. Here Kramer simply gave $1.00 for a claim of approximately $165,000. On the other hand, under the commission arrangements, the assignee in *Farmington* was permitted to keep 50 percent of the net collection whereas Kramer was only permitted to keep 5 percent.

as the court explained, there would be a case of a "collusive transfer" or "collusive assignment." 114 U.S., at 144-45.

As to the scheme in question, so similar to the one in the case at bar, the Court concluded that: "The suit is their own [the assignors'] in reality, though they have agreed that the plaintiff may retain one-half of what he collects for the use of his name and his trouble in collecting." 114 U.S., at 146. The Court, of course, concluded that: "We are clearly of opinion that this case falls within the prohibitions of the statute." 114 U.S., at 145.

The next decision of this Court also involves facts similar to those at bar. In *Little* v. *Giles*, 118 U.S. 596 (1886), an absolute deed to certain property was given by one Wheeler and one Burr to Giles, who was of diverse citizenship with the prospective defendant in the matter. As here, however, the parties had a collateral agreement under which after the expenses of litigation and the discharge of a mortgage on the property, Giles would remit back to Wheeler and Burr the value of one-third of the lands recovered in the suit. 118 U.S., at 605. Like Kramer, Giles was a stranger to the matter who was unfamiliar with the underlying events which had led to the controversy. Here again, the case was found to involve a "collusive transfer" and the suit was held outside of the Federal jurisdiction. 118 U.S., at 604.

Similar principles have been applied in corporate transfers where the assignor retained an interest in the subject matter of the suit. In *Lehigh Mining & Manufacturing Co.* v. *Kelly*, 160 U.S. 327 (1895), after a dispute over certain land had arisen between a Virginia corporation and certain individual Virginians, the Virginia corporation conveyed the land to a Pennsylvania corporation which was under common control with the assignor. There was no

issue as to the conveyance's being a valid instrument under local law, conveying the legal title. 160 U.S., at 339. But since the assignment was made for the purpose of creating Federal jurisdiction, and since the land could be reconveyed, or the proceeds of the suit retransferred, without consideration by the Pennsylvania corporation at any time to the Virginia corporation, the control and ownership of the corporations being the same, the Court concluded that the effect of the arrangements was that the beneficial ownership was in the Virginia corporation, found that the action was "collusive" within the meaning of the Act and held that Federal jurisdiction did not exist. 160 U.S., at 342-43.

A similar result was reached in *Miller & Lux, Inc.* v. *East Side Canal & Irrigation Co.*, 211 U.S. 293 (1908). There a dispute had arisen between two California corporations. One of them incorporated a subsidiary under the laws of Nevada and conveyed the property with respect to which the controversy had arisen to that subsidiary. Notwithstanding that the property was validly transferred in consideration for the issuance of the subsidiary's stock to the parent (211 U.S., at 303) the Court found that the case came within the predecessor of Section 1359 and that there was no Federal jurisdiction.[6]

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[6] The Court, conscious of the distinctions which had been recognized in the cases (see pp. 18-21, *infra*), observed that if at the time of the institution of the suit, "the California corporation had distributed among those entitled to it the stock of the Nevada corporation . . . and had then ceased to exist or been dissolved, a different question might have been presented. But such is not this case." 211 U.S., at 304. The Court pointed out that as long as the assignor remained in existence, without any new consideration it could have compelled at any time the Nevada corporation to transfer back the property which it had conveyed to it. 211 U.S., at 304.

The Court also pointed out that: "We do not intend by what has been said to qualify the general rule, long established, that the

A similar result was also reached in *Southern Realty Investment Co.* v. *Walker*, 211 U. S. 603 (1909), where certain Georgia attorneys maintained a South Dakota corporation which took title to claims for the purpose of suing on them against Georgia citizens in the Federal courts. While presumably the South Dakota corporation and the attorneys who organized it received some sort of commission for their efforts in collecting claims transferred to it, before remitting the proceeds to the assignors, the Court summarily held the device to be within the bar of the statute.

The lesson taught by all these cases is plain: Where a transfer is made with the motive of creating diversity of citizenship jurisdiction, and that transfer leaves the assignor with an interest, in whole or in part, by whatever means, in the subject matter of the assigned claim, the case is one of an "improper or collusive" transfer and the statutory bar—currently contained in Section 1359 of the Judicial Code—to Federal court jurisdiction is applicable.[7]

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jurisdiction of a Circuit Court, when based on diverse citizenship, cannot be questioned upon the ground *merely* that a party's motive in acquiring citizenship in the State in which he sues was to invoke the jurisdiction of a Federal court." 211 U.S., at 304 (emphasis original). See p. 19 and n. 8, *infra*.

[7] A Court of Appeals case, *Central Paper Co.* v. *Southwick*, 56 F.2d 593 (6th Cir. 1932) applies the line of cases from this Court to a fact situation once again reminiscent of the facts here. There an assignment was made to one Southwick, who paid only $1 for it, and "was to pay more only if he collected the money." 56 F.2d, at 596. It also appears that Southwick was to "deduct something for his services for making the collection." 56 F.2d, at 597. The Court of Appeals, applying the line of cases in this Court, and acknowledging that Southwick had been vested with "technical legal title to these claims", nonetheless held the scheme in question to be within the bar of the Act of 1875. 56 F.2d, at 596-97.

2. A line of authority also has developed in this Court over the years to the effect that where a transfer of a claim is in fact absolute, and the assignor retains no interest in the subject matter of the claim, the transfer is not a collusive one under the statute and the motive of the transfer is not relevant. It is, of course, on these cases, which are entirely different from the case at bar, that the petitioner relies so heavily. (See Brief, pp. 28-34).[8]

Thus, in *Cross* v. *Allen*, 141 U.S. 528 (1891), it was held that where there was an absolute transfer of title, "the pecuniary interest of the transferrer [sic] in the subject matter of the transfer having thereby terminated, it makes no difference that by such transaction the transferree [sic] acquired the advantage of suing in the Federal court." 141 U.S., at 533. Thus, if the parties here had been willing to make the transfer on a basis which in fact divested the transferor of its interest in the claim—such as by Panama's making a bona fide sale of it to Kramer for a lump sum, not on a basis which reserved 95 percent of the net recovery to the transferor—the motive of making the transfer would have been irrelevant.

This rule was applied in *South Dakota* v. *North Carolina*, 192 U.S. 286 (1904). There the considerations were not simply those of the diversity jurisdiction but of the

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[8] Petitioner accordingly follows the tack of arguing that the issue in this case is whether the motive of an assignment is *always* controlling, citing cases *in this category* to the effect that it is not. This false issue is repeatedly asserted and, naturally, won, throughout petitioner's brief. Thus, petitioner states (Brief, p. 28) that: "It has often been fashionable to assume that all efforts to create or manufacture Federal diversity jurisdiction are or should be condemned *per se*." And that: "a motive to create or manufacture diversity does not per se oust a federal court of jurisdiction." (*Ibid.*) As the cases we discuss here teach, this is so, but it is irrelevant. Similar assertions of the false issue as to whether motive is disqualifying *per se* appear in Petitioner's Brief at pages 29, 31, 32, 33 and 44.

Eleventh Amendment, the subject matter of the transfer being defaulted North Carolina State bonds. Certain bondholders made an absolute gift of the bonds to the state of South Dakota which proceeded to sue on them in an original suit in this Court. There was no suggestion whatsoever that the transferors retained any interest in the donated bonds. The Court upheld the jurisdiction in a five-to-four decision.[9]

Similarly, in *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928), the Court held that where a Kentucky corporation, having a dispute with another Kentucky corporation, transferred its assets to a Tennessee corporation and then dissolved, thereby

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[9] The Court observed that the transferors held *other* defaulted North Carolina bonds and "probably the donor made the gift under a not unreasonable expectation that South Dakota would bring an action against North Carolina to enforce these bonds, and that such action might inure to his benefit as the owner of other like bonds." 192 U.S., at 310. Just how it would is somewhat obscure, inasmuch as there still would have been no forum in which a suit could be maintained on the bonds by the individuals against the state of North Carolina. Indeed, the letter of transmittal giving the bonds to the State recited:

> "The owners of these bonds are mostly, if not entirely, persons who liberally give charity to the needy, the deserving and the unfortunate.
>
> "These bonds can be used to great advantage by States or foreign governments; and the majority owners would prefer to use them in this way rather than take the trifle which is offered by the debtor.
>
> "If your State should succeed in collecting these bonds, it would be the inclination of the owners of a majority of the total issue now outstanding to make additional donations to such governments as may be able to collect from the repudiating state, rather than accept the small pittance offered in settlement.
>
> "The donors of these ten bonds would be pleased if the legislature of South Dakota should apply the proceeds of these bonds to the State University or to some of its asylums or other charities.", 192 U.S., at 289-90.

In any event, the transfer of the donated bonds was absolute.

terminating the existence of the transferor Kentucky corporation, the "motives which induced" the transfer were irrelevant. 276 U.S., at 524. This was the case which had been left open in *Miller & Lux, Inc.* v. *East Side Canal & Irrigation Co., supra,* 211 U.S., at 304, see n. 6, p. 17, *supra,* and the Court accordingly observed that "it requires no discussion to distinguish" the *Miller & Lux* case. 276 U.S., at 525.

This line of cases is similar to the authorities which teach that where a natural person makes an actual transfer of his domicile to another state "with the intention of making [his] home in that state for an indefinite time" the fact that the purpose of the move was to create diversity jurisdiction is immaterial. *Williamson* v. *Osenton,* 232 U.S. 619, 623 (1914).[10]

In all these cases where the motive of a transfer has been found irrelevant, there is an obvious unifying feature. That feature is that the transferor has been divested entirely of any interest in the claim in question. Obviously, such a divestment is a fact of independent significance and provides a convenient and practical line which can be used for determining the jurisdiction of the Federal courts. In the cases where motive has been found irrelevant and the jurisdiction upheld, there have been factors such as the unqualified acquisition of the entire claim by the assignee on a basis which terminates the assignor's interest; the assignor's death;[11] a change in personal domi-

[10] Of course, where the change in domicile is feigned, the Federal courts are without jurisdiction. *Morris* v. *Gilmer,* 129 U.S. 315 (1889).

[11] Thus, for many years it was held that a Federal court would not go behind the order of a state court naming a decedent's administrator to inquire as to why an administrator of his citizenship was appointed. *Mecom* v. *Fitzsimmons Drilling Co.,* 284 U.S.

cile or, coupled with dissolution of the transferor corporation, in corporate domicile.

Requiring a fact of independent significance such as these limits the avenues for creating Federal jurisdiction as a practical matter. Here, obviously, the parties were unwilling that Kramer acquire the claim from Panama on a basis under which he would pay, and the transferor would receive, a lump sum valuation of the strength and

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183 (1931). In such a situation, where diversity is created by the appointment, there is no question but that the assignor—the decedent—is ousted by death of all interest in the claim and accordingly the courts have applied the rubric that under these circumstances the motive of the assignment—the choice of citizenship of the administrator—is not to be examined. The jurisdiction was accordingly upheld in a number of courts of appeals even where a purpose of the appointment of a particular administrator was to give him the right to sue in Federal court. See *Corabi* v. *Auto Racing, Inc.*, 264 F.2d 784 (3d Cir. 1959); *County of Todd* v. *Loegering*, 297 F.2d 470 (8th Cir. 1961); *Lang* v. *Elm City Construction Co.*, 324 F.2d 235 (2d Cir. 1963). To some extent, these cases also rely on an unwillingness to take a step smacking of collateral attack on a state court appointment.

Recently, under the weight of an increasing number of appointments of out-of-state administrators for decedents' estates with a motive to create Federal jurisdiction, the Third Circuit overruled its previous ruling in *Corabi*. See *McSparran* v. *Weist*, No. 16,793, 3d Cir., October 2, 1968, certiorari pending, No. 772, O. T., 1968. Whether the Third Circuit was correct in *Corabi*, or in *McSparran* in dealing with the problem of an apparently enormous influx of cases into the Federal courts, does not directly affect the issues involved in this case.

A result contrary to *Corabi* can be justified by holding that while the transfer of the claims to the estate of the decedent by his death is, of course, an absolute transfer and one of independent significance, substitutions of administrators or appointments of special administrators to prosecute individual actions—involved in *Corabi* and a frequent feature of these cases—are equivalent to transfers without any real divestment of economic interest, of the sort condemned by the line of cases described at pages 14-18, *supra*.

McSparran, although it expressly overruled *Corabi* (see slip opinion, p. 16), was itself a case involving the appointment of a guardian for a child. The cases involving such guardians are apparently in complete conflict due in part to the complicating fac-

market value of the claim, which would have left Panama without further interest in the outcome of the claim. If the parties were willing to go that far in dealing with claims, so that their transfer constituted a transaction having economic reality, it might make practical sense to treat motives as irrelevant. Similarly, the steps of dissolution of a corporation and reincorporation in another state, or of personal change of domicile, afford a substantial independent check on access to the Federal courts. Indeed, the line of cases in the courts of appeals to the effect that the citizenship of an administrator or executor, notwithstanding the motives of his appointment, is controlling for jurisdictional purposes regardless of the citizenship of the decedent, can be viewed as *a fortiori* cases from these principles.[12] Certainly it can be said that a person's death terminates his interest in his claims in as absolute a fashion as could be imagined. One would hardly think that access to the Federal courts would be worth such a cost to many litigants.[13]

The assignment involved here is completely different from those involved in the cases in which this Court has refused to look to the motives surrounding assignments.

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tors inherent in the relationship. See generally Wright, *Federal Courts* (1963), p. 82. Since the child generally cannot sue in his own name, but must sue through a representative, there would appear to be an argument available under the decided cases that the representative's citizenship should govern. On the other hand, where the suit might be maintained by a general guardian such as a parent, but a guardian *ad litem* is appointed of diverse citizenship, it can be contended that the citizenship of the special guardian is not controlling. See Wright, *Federal Courts* (1963), p. 82. *McSparran* involved the appointment of a special guardian.

[12] See n. 11, pp. 21-23, *supra*.

[13] As indicated above, cases involving substitute administrators, or the appointment of special guardians where general guardians exist, may pose separate problems. See n. 11, pp. 21-23, *supra*.

Here, the alien assignor retained 95 percent of the beneficial ownership in the claim, and Kramer simply had technical legal title plus a 5 percent commission or percentage interest. Moreover, although it is probably superfluous, control over the litigation remained vested in Banner, the attorney who had originally represented Panama. See pages 4-5, *supra*.

It is, of course, not without interest that the petitioner here originally attempted to bring this case within the line of cases holding that where the transferor's interest in an assigned claim had terminated, the motives for the transfer are not assailable.[14] Only the Assignment was pleaded in the complaint. The existence of the secret Side Agreement, which revealed that the assignor retained a 95 percent beneficial interest in the recovery, was not disclosed to the court or the respondent, and became known only after plaintiff was compelled by a court order to make it known. It was only after all the facts became known that the petitioner was forced to adopt the extraordinary legal theory set forth in his brief in this Court.

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[14] A case which comes close to the dividing line of the cases, but which was decided on other grounds is *Bullard* v. *City of Cisco*, 290 U.S. 179 (1933). There, a Bondholders' Protective Committee was permitted to invoke the jurisdiction of the Federal courts even though the individual depositors of the bonds in some cases had holdings of less than the jurisdictional amount. Although the depositors were of diverse citizenship from the defendant, see 290 U.S., at 181, the Court in a dictum apparently indicated that the citizenship of the committee members, rather than the depositors, would govern. See 290 U.S., at 190. The decision stresses the familiarity of the Protective Committee device, which was then—in the depths of the depression—a common one. See 290 U.S., at 181. The Court also stressed the broad range of powers invested in the committee "for the purpose of conserving, salvaging and adjusting the investment" in the insolvent issuer. 290 U.S., at 189. The Court observed that: "We think it apparent from the [depositary] agreement as a whole that resort to litigation was not

3. The scheme involved here, if approved by this Court, would bring about the availability of an almost universal "instant diversity" jurisdiction. This is in contrast to the line of authorities we have reviewed in part 2 above—where the courts have declined to look to motive only where the transferor has been completely divested of interest in the assigned claim—such as by death, by absolute transfer for a lump sum consideration or by gift without "grant back" or reservation of an interest in the claim, or by legitimate corporate succession coupled with dissolution of the transferor.

If diversity of citizenship can be created in this case through the device chosen, it can be created in any contract case involving the statutory jurisdictional amount, or, indeed, in noncontract cases wherever state law permits the assignment of noncontract claims.[15] There is

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the principal thing in mind when it was being made." 290 U.S., at 190.

The motive of the arrangement in *Bullard* was clearly not to create Federal jurisdiction, inasmuch as all the depositors were of diverse citizenship and apparently most had claims in excess of the jurisdictional amount. The case is thus similar to that of a stockholders' derivative suit or a class action, where the citizenship of the particular stockholder or class member who brings suit is determinative, even where other stockholders or members are of common citizenship with the defendant. See *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921). Focusing on the citizenship of the Protective Committee members, the stockholder, or the class representative does not open the Federal courts to suits which would not otherwise be there; it simply permits the more complete adjudication of a claim which could be entertained in any event in Federal court at the individual suit of a bondholder, stockholder or class member of appropriate citizenship. On the other hand, jurisdictionally honoring an assignment of a claim on a "five percenter" basis, such as here, would vest the Federal courts with jurisdiction of matters they would not otherwise have.

[15] See, e.g., *Smith* v. *State Farm Mutual Automobile Ins. Co.*, 278 F. Supp. 405 (E.D. Tenn. 1967) (*ex delicto* actions for injury to property are assignable under Tennessee law); *Kerigan*

nothing peculiar or unique about the Texas law in this respect and we may assume that under the law generally in this country, the Assignment and the Side Agreement would both be enforceable in accordance with their terms, certainly with respect to claims arising under contract.[16] Thus, should the Court depart from the settled line of precedents set forth at pages 14-18 above, diversity of citizenship could be created in any contract case by finding an out-of-state assignee—of which there would be no shortage[17]—to execute the assignment and grant-back papers, reserving a modest commission.[18] Of course, for the

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v. *Massachusetts Bonding & Ins. Co.*, 74 F. Supp. 820 (W.D. Mo. 1947) (action for fraud and deceit is assignable under Missouri law).

[16] Today "[n]early everywhere, statutes have formally declared contract rights and other 'choses in action' to be assignable, so that in an ordinary civil action the assignee can (and generally must) maintain suit in his own name." 4 Corbin, *Contracts* (1951), § 856, at p. 408. See also Restatement 2d, *Contracts* (Tent. Draft No. 3, 1967), pp. 141-62. As Petitioner recognizes, see Brief, pp. 36-37, Texas law is not unique in holding that lack of consideration for a completed assignment is immaterial. See *Globe Indemnity Co.* v. *Puget Sound Co.*, 149 F.2d 805 (2d Cir. 1945). Nor is Texas law unique, assuming it permits an assignee to maintain suit even though he must account for the proceeds of the suit to his assignor. See *Titus* v. *Wallick*, 306 U.S. 282, 289 (1939) (under New York law assignment is valid "even though the assignment is for the purpose of suit only and the transferee is obligated to account for the proceeds of suit to his assignor"; judgment obtained by assignee must be accorded "full faith and credit").

[17] The availability of the device might afford opportunities for friendly cooperation among members of the bar. In one case, one could serve as attorney and the other as assignee, and in the next case the roles could be reversed. As Kramer said here, during a lapse into candor, if he had acted as attorney on the claim, "I would have had the 33⅓% and Mr. Banner would have had the 5%." (App. 52)

[18] The record indicates here that there were negotiations as to whether Kramer's commission would be 5% or 10%. (App. 46) If the device used here is sanctioned, undoubtedly in subsequent

reasons which we shall develop at pages 37-39, *infra*, the restriction of the doctrine belatedly contended for in this case to "alienage" situations—which was not suggested in the Petition for Certiorari and is even absent from the "Questions Presented" in the petitioner's brief on the merits—will not hold water.

If this Court sanctions the device used here, one may confidently expect that the text of the Assignment and of the Side Agreement here involved would be printed in form books on Federal procedure so that they would be easily available to everyone. They would become of universal application. Publishers publishing the Federal Rules of Civil Procedure would undoubtedly find it a service to the Bar to reproduce the forms as a special appendix. While the unearthing of the Side Agreement in this case may have been somewhat painful to Kramer, once the device at bar were sanctioned by the Court the need for any secrecy in its use would vanish and subsequent plaintiffs could make open reference to it and openly quote it in their complaints. As these forms' use became more standardized, in the interest of the shortened form of pleading contemplated by the Federal Rules of Civil Procedure, it might be acceptable simply to plead that the assignor and the plaintiff had executed an Assignment and a Side Agreement in the common form.

We trust that the foregoing discussion will not seem unduly apocalyptic. There is no reason why, if the device at bar here is not within Section 1359, it could not be utilized in any case where the claim in question was assignable

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cases the commission level would be reduced and very likely the negotiations would simply be as to whether the commission would be 1% or 2%. After all, one would anticipate that pioneers like Kramer would be entitled to a greater reward than those who would simply follow in their footsteps.

as a matter of state law and where the jurisdictional amount was present.[19]—Petitioner has notably failed to point to any reason in policy why the Court should reach such a result. All the policy reasons look the other way.[20] Once

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[19] Thus, after the *Corabi* decision in the Third Circuit, a study by the ALI of the diversity actions brought in the Eastern District of Pennsylvania indicated that approximately 20% of the actions were instituted by out-of-state fiduciaries. ALI Study of the Division of Jurisdiction Between State and Federal Courts, Proposed Final Draft No. 2 (April 30, 1964), Commentary, p. 63, § 1301. The plain fact is that where a device such as that sanctioned in the *Corabi* case or contended for by petitioner here is sanctioned and available, it will be vigorously used. Thus, in the 1950's the Philadelphia Orphans Court, after a study of relative verdicts in the Pennsylvania Common Pleas Courts and in the Federal Court for the Eastern District of Pennsylvania, determined that since larger verdicts were expectable in Federal Court, in the interests of the children which were its wards it would thereafter overcome its previous reluctance to appoint an out-of-state fiduciary and do so upon request. *McSparran* v. *Weist*, 3d Cir., No. 16,793, October 2, 1968, slip opinion, p. 7. Once the assignment device used here were sanctioned, no doubt a similar duty to act in the best interests of his client through the consideration of the use of the device would be incumbent upon all attorneys representing prospective plaintiffs in cases where no diversity existed between the real parties in interest.

We do not mean to suggest that the devices involved in the *Corabi* case and here must stand or fall together. As we have developed, the historic line drawn by the decisions of this Court could well be said to lie between the practice permitted by *Corabi* and the device here. To be sure, the experience under the *Corabi* rule, which led to its overruling in the *McSparran* case, might well lead the Court to conclude that the line should be drawn so as to include additional schemes within the bar of Section 1359. But certainly there is no reason in policy why devices which were previously barred should now be permitted.

[20] There are a number of reasons that are advanced for the diversity jurisdiction: that it removes or lessens the danger of local prejudice against out-of-state litigants and thereby fosters the national mobility of capital, investment and population; that it is necessary to implement the Constitutional guarantee that "the citizens of each State shall be entitled to all the privileges and immunities of the several States," Art. IV, § 2; and that Federal courts are allegedly superior to State courts. See Wright, *Federal Courts* (1963), § 23. It is significant that none of these reasons suggest that an assignee such as petitioner should be able

the device was sanctioned, every lawyer representing a potential plaintiff in a dispute between citizens of the same state would, we submit, be duty bound to consider whether the advantages of bringing the case in Federal court would outweigh the modest percentage commission which would have to be retained by the assignee. There is nothing unique about the scheme here which would suggest that it could be limited to cases where the original parties were aliens or where their names were the same as the parties to this case.

II. NONE OF THE REASONS CITED BY PETITIONER FOR THE ALLEGED INAPPLICABILITY OF THE UNIFORM DECISIONS OF THIS COURT TO THIS CASE IS VALID

To avoid the result taught by the settled line of cases in this Court, to the effect that a transfer which does not divest the transferor of its entire interest in the claim must

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to manufacture diversity jurisdiction. As we point out at pp. 38-39, *infra*, it is unlikely that a State court would show bias in a suit involving two aliens; and it is ludicrous to suggest that an assignment is a necessary device to avoid prejudice in a suit between citizens of the same state. The argument in favor of diversity based upon the privileges and immunities clause is inapplicable by its terms to a suit involving two aliens or two citizens of the forum State—the type of suit in which assignments have been most frequently used in efforts to create diversity. The justification based upon the alleged superiority of the Federal courts proves too much for, if accepted, it would support a finding of Federal jurisdiction in any suit in which it is presently lacking. It presents a matter for consideration by way of a constitutional amendment, not judicial action. Cf. *United Steelworkers* v. *Bouligny, Inc.*, 382 U.S. 145 (1965).

Moreover, even those who are strongly in favor of *extending* diversity jurisdiction, see Moore & Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 Texas L. Rev. 1 (1964), believe that the limited jurisdiction of the Federal courts requires "a prohibition against the manufacture of diversity jurisdiction . . . by a colorable assignment or otherwise." *Id.*, at 35. See also 3A Moore's *Federal Practice* (1968), ¶ 17.05 [3.-3].

be viewed as "improper or collusive" under the statute where motivated by a desire to create federal jurisdiction, petitioner urges three grounds:

(1) The effect of the 1948 codification of the Judicial Code;

(2) That the Assignment here (and presumably the Side Agreement) are valid under state law; and

(3) That the underlying claim here is not between two citizens of the same state but between two aliens.

None of these arguments for dispensing with the settled treatment of schemes similar to this in the long line of cases in this Court is valid.

1. *The Effect of the 1948 Codification.*—The petitioner urges that the 1948 codification of the Judicial Code changed the result of the cases which we cite at pages 14-18, *supra.* This is apparently claimed for two separate grounds:

(a) There is first a highly tentative suggestion by petitioner that the cases which condemn schemes like the one at bar were decided under the so-called "Assignee Clause" of the Judiciary Act of 1789, Section 11, 1 Stat. 79. (Brief, pp. 40-42) This clause forbade, with an increasing number of exceptions and in increasingly confused terms over the years, an assignee *of certain sorts of claims* to sue in Federal court—notwithstanding the absolute transfer of the assignor's rights to him or the bona fides of that transfer—unless his assignor could have sued.[1]

The fact that the "Assignee Clause" of the Act of 1789 was dropped completely in the 1948 revision is completely

[1] The Judiciary Act of 1789, c. 20, § 11, 1 Stat. 78, provided that:

"... [No] district or circuit court [shall] have cognizance of any suit to recover the contents of any promissory note or

immaterial. The fact of the matter is that none of the cases striking down schemes such as petitioner's which we have cited above (pp. 14-18) was decided under the Assignee Clause. They were all decided under Section 5 of the Act of 1875, which denied Federal jurisdiction where the parties to a suit "have been improperly or collusively made or joined . . . for the purpose of creating a case cognizable or removable" in or to Federal court. Immediately prior to the 1948 revision Section 5 of the 1875 Act was known as Section 80 of Title 28 of the U.S. Code. As the Reviser's Note points out, the approach in drafting Section 1359 was "substantially following said Section 80."[2]

(b) Petitioner lays more emphasis on the fact that in adapting Section 5 of the Act of 1875 (later Section 37 of the Judicial Code of 1911 and Section 80 of the original Title 28 of the U.S. Code) the 1948 codifiers omitted certain language. We have set forth the language of the prior statute, and of the present Section 1359, in the margin for ready comparison.[3]

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other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. . . ."

By the time of its final version as 28 U.S.C. § 41(1) (1946), the Clause provided that:

"No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

[2] The Reviser's Note is set forth following 28 U.S.C. § 1359, at pp. 26-27 of the U.S.C.A. volume.

[3] In its last pre-1948 version, the provision in question (§ 37, 1911 Judicial Code, 36 Stat. 1098, 28 U.S.C. § 80), read as follows:

"If, in any suit commenced in a district court, or removed from a State court to a district court of the United

The language omitted in 1948 was the language to the effect: "if, in any suit commenced in a district court or removed from a state court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court . . . ." From this deletion, petitioner seeks to have this Court draw the inference that it is only where there is collusion between the ostensibly opposing sides of a lawsuit[4] that the bar of Section 1359 is applicable. (Brief, pp. 42-49)

States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

28 U.S.C. § 1359 presently provides that:

"A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

[4] It appears that the only court which has ever adopted the view that "collusively" as used in Section 1359 has the restricted meaning suggested by petitioner was the Court of Appeals for the Third Circuit in *Corabi* v. *Auto Racing, Inc.*, 264 F.2d 784 (1959). In *McSparran* v. *Weist*, No. 16,793, October 2, 1968, the Third Circuit overruled *Corabi* and expressly repudiated this narrow view of the meaning of "collusive" in the statute. See slip opinion, pp. 10-12. Indeed, even in *Corabi* the expression of views was a dictum, the court having already decided that the case of an appointment of an administrator fell within the line of cases holding that in a transfer which divests all interest of the assignor, the motive for the transfer is not relevant. See pp. 18-23, *supra*.

This argument is totally fallacious. In the first place, it was the express intention of the revisers in deleting the language in question that no substantive change in the law be made, inasmuch as the deleted language was unnecessary. The Reviser's Note says, simply enough, that the language was "omitted as unnecessary" since "any court will dismiss a case not within its jurisdiction when its attention is drawn to the fact, or even on its own motion." [5]

Not only did the revisers think that dropping the language in question made no substantive difference, but the long line of cases decided under the provision turned not on the language that was deleted in 1948 but the language that was retained by the 1948 revisers—the language referring to "improperly or collusively" making or joining parties. While this language obviously included, among other things, collusion between the plaintiff and the de-

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[5] Petitioner repeatedly quotes (Brief, pp. 43, 45) a question from that prolific book of questions, Hart & Weschler, *The Federal Courts and the Federal System* (1953), p. 721: "Were the revisers well-advised in what they did?"

While we cannot pretend to know the answers to all the questions asked in Professors Hart & Weschler's book, it seems clear from the context (a discussion of "Challenging the Existence of Federal Jurisdiction in Regular Course of Trial and Appellate Review") that what the Professors were asking was whether the revisers might have inadvertently upset the rule that a Federal court will examine its own jurisdiction at any time, *sua sponte* if necessary. Evidently under certain of the early 19th century cases, decided prior to the 1875 Act, this was not the case. (See *Farmington* v. *Pillsbury, supra,* 114 U.S., at 142, discussed at pp. 15-16, *supra;* see also *Smith* v. *Kernochen,* 7 How. 198 (U.S. 1849), discussed in n. 8, pp. 36-37, *infra.*) The language deleted obviously is relevant to this issue as to the appropriate time for jurisdictional challenges. The question is not meant to suggest that in fact the revisers accidentally made a substantive change in those schemes which would be held ineffective to create Federal jurisdiction. See generally Hart & Weschler, *supra,* pp. 719-21.

Of course here, the respondent has at all stages of the proceeding, by Rule 12 motion and by answer, denied the jurisdiction of the Federal courts over this suit. There is no issue as to the timeliness of its challenge to the jurisdiction.

fendant (see *Detroit* v. *Dean*, 106 U.S. 537 (1882)), it was applied to all the schemes, similar to the one here, embraced in the cases we have discussed at pages 14-18, above, where there was no collusion between the two sides of the lawsuit and where in fact the defendants uniformly were staunchly denying the existence of jurisdiction.

Since the revisers did not intend to change the substantive law, and since they retained the operative language under which the former cases had been decided,[6] it would not appear permissible to do anything other than bring forward the distinction taught by the long line of cases decided under the 1875 Act, namely, that where an assignment leaves the assignor with a beneficial interest in a claim, and is made for the purpose of conferring Federal jurisdiction—as is the case here—it is within the bar of the statute. After all, the basic teaching concerning the interpretation of the 1948 revision is that: "Statements made by several of the persons having importantly to do with the 1948 revision are uniformly clear that no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such change is clearly expressed." *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 227 (1957). To the same effect, see *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 532 n. 11 (1967); *Ex parte Collett*, 337 U.S. 55, 68-69 (1949).[7]

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[6] For the reliance on these decisions on the portion of the statutory language which was retained in Section 1359, see *Williams* v. *Nottawa*, *supra*, 104 U.S., at 211; *Farmington* v. *Pillsbury*, *supra*, 114 U.S., at 144-45; *Little* v. *Giles*, *supra*, 118 U.S., at 604; *Lehigh Mining & Manufacturing Co.* v. *Kelly*, *supra*, 160 U.S., at 339.

[7] See 3A Moore's *Federal Practice* (1968), ¶ 17.05 [3.-1], at p. 157 to the effect that Section 1359 carries forward the teachings developed under the 1875 statute. For Moore's part in the revision, see *State Farm Fire & Cas. Co.* v. *Tashire*, *supra*, 386 U.S.,

2. *The Question of Validity under State Law*—The petitioner also suggests that an almost controlling factor as to whether an assignment escapes the bar of Section 1359 is whether the assignment is valid under state law. (Brief, pp. 34-40, 49-51) We do not, of course, deny that an assignment invalid under state law should not be recognized in Federal court. Moreover, an assignment valid under state law, in a case otherwise within the diversity jurisdiction of a Federal court, under normal principles, would be honored as a matter of substantive law by the court. The question, rather, is whether state-law validity of an assignment is somehow determinative of this case; that is to say, whether if under state law the Assignment vested legal title to the claim in Kramer, and the Side Agreement created an obligation on Kramer to account for 95 percent of the net proceeds, and these arrangements were enforceable between the parties to them, and would have permitted Kramer to sue in his own name in a Texas state court, it somehow would mean that the Federal courts would be bound to uphold the device as a creator of diversity jurisdiction.

This suggestion is likewise without merit. To a considerable extent it appears to be predicated on the erroneous contention (which we discuss above, pp. 31-34) that the 1948 revision inadvertently changed the substantive law taught by the established cases in this Court. Succinctly stated, the petitioner's position is that: "In thus restructuring § 1359, the revisers can be said to have rendered somewhat impotent . . . the precedential value of certain pre-revision decisions of this Court . . . ." (Brief, p. 46) The petitioner's position is that the section is now limited to collusion between the

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at 532 n. 11. To the same effect is *Bradbury* v. *Dennis*, 310 F.2d 73, 74 (10th Cir. 1962), cert. denied, 372 U.S. 928 (1963).

two sides of the lawsuit or to devices which are "illegal or fraudulent in . . . inception or contrary to relevant state law." (Brief, p. 49) But this position is clearly wrong; as we have shown above, the 1948 revision did not change the substantive law established by this Court's decisions over the years under the 1875 statute.

To the extent that the petitioner's argument is not based on a contention that the 1948 revision changed the law, its focus on the question of fraud or illegality under state law is a concentration on a matter of complete irrelevance. The cases we have discussed (see pp. 14-18, *supra*) demonstrate that it is of no importance whether the assignments in question would have disqualified the assignee from suing in his own name in state court or whether the arrangements were enforceable between the parties.[8]

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[8] In only two of the cases is there any express discussion of the validity of the arrangements between the parties under state law, although in all the cases their validity under state law appears to be presumed. In *Little* v. *Giles*, *supra*, 118 U.S., at 602, the Court expressly held that although the deed of assignment was "binding between . . . [Giles] and his grantors," it still amounted to a collusive transfer within the meaning of the Act of March 3, 1875. In *Lehigh Mining & Manufacturing Co.* v. *Kelly*, *supra*, 160 U.S., at 336, 347, it was common ground between the majority and the dissenters that "technical legal title" was in the transferee who "could legally assert its title against the parties in possession in a state court." Nonetheless, the Court found the assignment "collusive" within the meaning of the statute. These cases—and the obvious approach of the other cases which we have discussed which treat the state law questions as irrelevant—refute the petitioner's suggestion (Brief, p. 49) that: "Compliance with state law becomes not only relevant but dispositive of the collusion issue [under Section 1359]."

Indeed, in a case decided before the passage of the 1875 Act, but decided under general principles of the diversity jurisdiction (not under the assignee clause), it had been settled that the question of diversity jurisdiction in the Federal courts did not turn on the validity of an assignment under state law or whether the assignee could sue in a state court. In *Smith* v. *Kernochen*, 7 How. 198 (U.S. 1849), the Court was presented with the contention that federal jurisdiction was lacking because the plaintiff below had been assigned the mortgage upon which suit was based for

The reasons are obvious. Whether an assignee may sue in his own name in a state court is a function solely of the state's policy with respect to the assignment of claims. Commercial practice has been the touchstone in the development of the law here. Jurisdictional considerations, even under state, let alone Federal law, have not been factors in the development of state law here. The state courts and state law certainly have no interest in, and no relevance to, the question of when the jurisdiction of the Federal courts should be protected against assignments which leave the assignor a substantial beneficial owner of a claim and are made for the purposes of creating Federal jurisdiction.[9]

3. *The Alleged Distinction Between Ordinary Diversity and Alienage Diversity.*—Although not made in the Petition for Certiorari, petitioner as an introductory argument in his brief (pp. 23-28) advances the fantastic contention that devices to create Federal jurisdiction, which would not pass muster where the underlying controversy was between citizens of the same state, should be treated more indul-

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the purpose of manufacturing diversity of citizenship. The Court noted that "[t]he suit would be free from objections in State courts," but nevertheless indicated that timely objection could have been made in federal court that "the transaction between the company [mortgagee] and the plaintiff [mortgagee's assignee] was fictitious and not real; and the suit still, in contemplation of law, [is] between the original parties to the mortgage. The question, therefore, is one of proper parties to give jurisdiction to the Federal courts; not of title in the plaintiff. That would be a question on the merits. . . ." 7 How., at 215-16.

[9] In a related argument, petitioner contends (Brief, pp. 51-52) that the "findings" of the trial judge and the jury somehow make this case different. As developed above, the jury did not pass on the jurisdictional issue (n. 8, pp. 7-8, *supra*) and its finding does not answer the proper question. The court's recital that the Assignment was "good on its face" (p. 7, *supra*) obviously is only the start, not the end, of the inquiry.

gently where the underlying controversy is between two aliens.

(a) In the first place, it must be pointed out that there is no basis whatsoever in the statutes for any such view. Neither the Constitutional, nor (with one brief exception)[10] the historic statutory definitions of the so-called "diversity" jurisdiction, ever has included *either* suits between citizens of the same state or suits between aliens (notwithstanding that the aliens are citizens of different foreign nations, as here). Section 1359 makes no distinction between devices to manufacture diversity citizenship where the dispute is really between citizens of the same state and where it is really between aliens. There is no reason in the Judicial Code whatsoever why this Court's construction of Section 1359 in this case would not be applicable, under the statutes, to cases where diversity jurisdiction is manufactured where the underlying controversy is between citizens of the same state.

(b) Not only is there no basis in the statutes for such a distinction, there is clearly no reason for laboring to try to perceive or, rather, to create one. It is completely mysterious why it is contended that the Federal courts should be opened to controversies between aliens where they would not be opened to suits between United States citizens who happen to live in the same state. There is no reason in policy for the Federal courts to strain a point to become a forum for the adjudication of disputes among foreigners. Necessity may have made this country to some extent the world's policeman, but it had not been, we suppose, suggested prior to this case that we should become the world's justiciary as well.

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[10] The 1789 Judiciary Act purported to vest jurisdiction in such cases, § 11, 1 Stat. 78. The provision was promptly declared unconstitutional in *Hodgson* v. *Bowerbank*, 5 Cranch 303 (U.S. 1809).

There is no reason in policy why suits between aliens not involving federal questions should not be left either to the courts of their own countries or to the state courts, where they have personal jurisdiction. The suggestion that, say, a New York state court would be biased in a dispute between an Argentinian and a Chilean seems rather far-fetched. Bias might be more likely in a suit between a New Yorker and the Argentinian, but the Federal courts are clearly open for the hearing of such a suit.

(c) The suggestion is particularly misconceived coming from the petitioner—as indeed it would from any citizen "five percent" assignee of an alien's claim. Under the device employed here, it appears that Kramer could have sued the respondent, a Haitian corporation, in a Texas state court. It is, we assume, not notorious that the Texas state courts are biased against their own citizens and in favor of Haitians, or that having procured the assignment of title to the claim here and a 5 percent interest in it, Kramer then needed to invoke the protection of the Federal courts in order to obviate the prejudice rampant in Wichita Falls, Texas, in favor of Haitians. The assignee-plaintiff seeking to create jurisdiction will, of course, always be a citizen suing an alien.

In summary, there is no reason either in the statutory language or as a matter of policy for treating devices to manufacture diversity jurisdiction any better when the jurisdictional bar being avoided is the bar against suits in the Federal courts by one alien against another as compared with that against a suit between citizens of the same state.

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In a final extraordinary argument, petitioner suggests (Brief, pp. 52-53) that if the Court is of a mind to af-

firm the judgment below, "such a ruling be made prospective in effect so as to avoid hardship to this petitioner." In other words, the judgment of the Court of Appeals should be declared to be correct but nonetheless it should be reversed.

The technique of prospective judicial action has been, of course, applied in cases where established precedent is overruled, though even there only rarely. See, e.g., *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *DeStefano* v. *Woods*, 392 U.S. 631, 633 (1968); *Stovall* v. *Denno*, 388 U.S. 293 (1967).[11] Here the basic contention of petitioner is not that the old, established precedents—which we review at pages 14-18 above—should be followed, but that they should be departed from.[12] Petitioner contends not for a doctrine of prospective overruling but for one of prospective non-overruling; the only overruling—of this Court's established precedents—is to be on a one-way ticket issued to him alone.

Petitioner alleges that there has been no direct precedent under Section 1359 (that is, after the 1948 recodification) involving the matters here at stake. All this means

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[11] In *Linkletter*, retroactive effect was denied to *Mapp* v. *Ohio*, 367 U.S. 643 (1961), which had overruled *Wolf* v. *Colorado*, 338 U.S. 25 (1949). The *DeStefano* case teaches that the "retroactive—prospective" choice is one which is to be made with respect to a "case reversing prior doctrines in the area of the criminal law." See 392 U.S., at 633. The *Stovall* case indicates that the question arises with respect to the retrospective application of "rulings [which] were not foreshadowed in our cases." 388 U.S., at 299.

[12] While the action of the Third Circuit in *McSparran*, see n. 11, pp. 21-23, *supra*, was made prospective only (slip opinion, pp. 17-18), there the action of the court was one which overruled its earlier decision in the *Corabi* case. The decision to act prospectively only was taken on the basis that the court recognized "that many actions are now pending in the courts of this circuit in reliance on our earlier decisions." (slip opinion, p. 17) There is no comparable situation here.

is that litigants have not had the effrontery in recent years—since the 1948 recodification—to essay a scheme as patently beyond the pale of this Court's established decisions as this one here. Even petitioner thought it in his advantage not to be entirely candid about the Side Agreement until he was made to be.

It is also asserted, in support of this extraordinary request (Brief, p. 52), that "petitioner reasonably believed that he had a right to invoke Federal jurisdiction." No case suggests that the jurisdiction of the Federal courts depends upon the reasonableness of the plaintiff's belief in assuming that it existed. Moreover, the strength of petitioner's belief as to the existence of Federal court jurisdiction here on all of the facts was not quite robust enough to lead him to make an immediate and candid disclosure of the Side Agreement.

Forthwith after the Assignment and the Side Agreement, petitioner sought to maintain this action in Federal court. It is obvious that this choice was a conscious one. The Assignment was motivated by the desire to create Federal jurisdiction. Federal court jurisdiction was then asserted on a basis under which all the relevant facts were not candidly disclosed. While the petitioner's scheme for manufacturing Federal jurisdiction was upheld by the District Court, it was promptly and unanimously rejected by the Court of Appeals. No reason is suggested why the suit could not have been brought in the Texas state courts in the first place. The device used here to manufacture jurisdiction is one which has been condemned by a line of decisions in this Court ranging back for almost a century. Even assuming that this Court somehow had the power to do so, there is absolutely no reason to take the extraordinary step of holding that Federal jurisdiction should be granted to Kramer here simply *pro hac vice*.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.[12]

Respectfully submitted,

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[12] Certiorari was granted in this case on a Petition which primarily recited a conflict with *Corabi* v. *Auto Racing, Inc.*, 264 F.2d 784 (3d Cir. 1959). (See Petition, pp. 7-9) Although decisions in other Courts of Appeals which have followed *Corabi* have not been overruled, *Corabi* itself has recently been overruled by the Circuit which produced it in the *McSparran* case, *supra*, n. 11, pp. 22-23. The present scheme is clearly beyond the pale and outside the mainstream of the presently controversial issues involving the deliberate creation of diversity jurisdiction, such as the issue whether *Corabi* or *McSparran* is the proper rule in cases involving court appointments of fiduciaries (see n. 11, p. 22 and n. 19, p. 28, *supra*), and this case is not an appropriate vehicle to shed any light on that controversy. This is underscored by the petitioner's belated attempt to restrict the principles for which he contends to alienage situations.

For these reasons, we respectfully suggest that the Court may wish to consider whether the Writ of Certiorari should be dismissed as improvidently granted.